U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 11 May 2006

IN THE MATTER OF:

THOMAS V. JACOBS,
Claimant,

v. Case No.: 2004-BLA-5183

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES: I. John Rossi, Esq.
For the Claimant

Rachel Parsons, Esq.
For the Director, OWCP

BEFORE: Thomas M. Burke
Associate Chief Administrative Law Judge

DECISION AND ORDER DENYING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. § 901 et seq. ("Act"), and the implementing regulations thereunder at 20 C.F.R. Parts 718 and 725 (2005). A hearing was held in Ottumwa, Iowa on August 25, 2005. The decision in this matter is based upon the testimony of Claimant at the hearing, all documentary evidence admitted into the record at the hearing, and the post-hearing arguments of the parties. The documentary evidence admitted at the hearing includes Director's Exhibits (Dx.) 1-39 and Claimant's Exhibits (Cx.) A, B1, B2, and B3.

Overview of the Black Lung Benefits Program

The Black Lung Benefits Act is designed to compensate those miners who have acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Those miners who have worked in or around mines and have inhaled coal mine dust

over a period of time, may contract black lung disease. This disease may eventually render the miner totally disabled or contribute to his death.

Procedural History

1. The miner filed is first claim for benefits on August 13, 1979, which was denied by the district director on November 8, 1979 for failure to establish any element of entitlement. Dx. 1.

2. A second claim for benefits was filed on June 11, 1984. Dx. 2. On October 4, 1988, Administrative Law Judge V.M. McElroy issued a Decision and Order – Denial of Benefits after a formal hearing. In his Decision, Judge McElroy credited the miner with five years of coal mine employment. He also found that pneumoconiosis was not established by the medical evidence of record and denied benefits. Judge McElroy did not make any determinations regarding whether the miner was totally disabled. Claimant appealed and, by Decision and Order dated December 14, 1990, the Benefits Review Board (Board) affirmed Judge McElroy's Decision.

3. The miner filed a third claim for benefits on August 19, 2002. Dx. 4.

4. A Certificate of Marriage establishes that Claimant married Norma on January 8, 2000. Dx. 11.

5. On May 2, 2003, the district director issued a Proposed Decision and Order Denial of Benefits for failure to establish any element of entitlement. Dx. 26. The district director credited the miner with 1.19 years of coal mine employment.

6. By letter dated May 14, 2003, Claimant requested "modification" of the district director's Proposed Decision stating that additional coal mine employment and medical evidence would be submitted. Dx. 27.

7. On June 9, 2003, the district director issued a Revised Proposed Decision and Order Denial of Benefits on grounds that Claimant failed to establish any element of entitlement. Dx. 28. Further, the district director credited Claimant with 1.66 years of coal mine employment.

8. By letter sent via facsimile to the district director on July 8, 2003, Claimant again requested reconsideration based on additional medical evidence. Dx. 29.

9. By response dated July 8, 2003, the district director advised that the Revised Proposed Decision had become final and Claimant had until July 9, 2004 to submit additional evidence on modification. Dx. 30.

10. On September 18, 2003, the district director issued a Proposed Decision and Order Denying Request for Modification. Dx. 35. The district director found the presence of pneumoconiosis, but not total disability.

11. By letter submitted on October 17, 2003, Claimant requested a hearing. Dx. 36.

12. The claim was referred to this Office for adjudication on October 30, 2003. Dx. 38.

Issues Presented for Adjudication and Stipulations

The issues listed as contested on the CM-1025 include: (1) whether the miner has documented 12 years of coal mine employment; (2) whether his pneumoconiosis arose out of coal mine employment; (3) whether he is totally disabled; and (4) whether the miner's total disability was due to pneumoconiosis. Dx. 38.

The district director conceded the presence of pneumoconiosis based on Dr. Cohen's positive chest x-ray interpretation. Dx. 35 and 38. Given this stipulation and the fact that his last claim was denied for failure to demonstrate the presence of pneumoconiosis, Claimant has established an element of entitlement previously adjudicated against him under 20 C.F.R. § 725.309 and the entire record in this matter must be accorded de novo consideration.

Length of coal mine employment

Initially, Claimant's length of coal mine employment must be resolved. The miner asserts 12 years of such employment, whereas the district director found only 1.66 years established. At the hearing, however, counsel for the Director stipulated to five years of coal mine employment as found by Judge McElroy in his October 1988 Decision.

On the CM-911a, Claimant set forth the following coal mine employment history. Underneath each listing is the Social Security earnings for the employer:

Kennis Coal Company extracting coal 1935 or 1936 to 1942
(No Social Security earnings reflected for this employer)

New Block Coal Company shoveling and extracting coal Fall 1942 to July 1944
(Social Security records reflect one quarter of earnings in 1942 and one quarter of earnings in 1943 for this employer)

Ragona Coal Company extracting coal 1945 to 1948
(No Social Security earnings are reflected for this employer)

Dx. 2 and 6.

At the hearing, Claimant testified that the mines did not operate in the summertime. Tr. at 18. He recalled that the mines opened in August and September and closed again in the Spring. Tr. at 18. In the summer months, Claimant would help his father on the family farm. Tr. at 17-18. Claimant also testified that he served in the Army from July 1944 until 18 months later in October 1945. Tr. at 18. Immediately after returning from serving in the Army, Claimant worked for Jacob Foster. Tr. at 18.

Kennis Coal Company (1936 – 1943)

Social Security records do not list earnings for Claimant prior to 1941. Dx. 2. Claimant was born on February 14, 1922. As a result, if he worked for Kennis Coal Company in 1935 or 1936, he would have been 13 or 14 years old and Social Security earnings would likely have not been reported for him. Claimant testified at the hearing that he started working for Kennis Coal in the Fall of 1936 when he was 14 years old and made about 50 cents per day. Tr. at 12. He recalled that he quit school at the time to go to work in the mines. Tr. at 12. He was in the eighth grade and never returned to finish high school. Tr. at 12. He worked for Kennis Coal until 1943 when he made about $2.50 per day. Tr. at 13. On the CM-911a filed with his first, second, and third claims, the miner consistently reports working for Kennis Coal from approximately 1936 to 1942 or 1943. Dx. 1, 2, and 6.

An affidavit filed in conjunction with the miner's second claim corroborates Claimant's testimony with regard to his employment with Kennis Coal Company. The affidavit is dated September 6, 1979 and is executed by A. Alfonse Kennis, a part-owner of the company. Dx. 2. Mr. Kennis states the following:

> Thomas V. Jacobs was employed by Kennis Coal Co., as a mule driver and truck driver on coal haulage during the years mentioned on reverse side (September 1936 to December 1941). The dates are correct to the best of my memory as records of this company have been lost and (are) no longer available.

Dx. 2. Based on Claimant's testimony that the mines did not operate in the summertime, he will be credited with working from September to May (or nine months) of each full year. Thus, Claimant is credited with nine months of employment in 1937, 1938, 1939, 1940, and 1941. According to Mr. Kennis' affidavit, Claimant started work in September 1936 and is credited with four months of employment for that year. Thus, Claimant has demonstrated that he worked a total of 49 months (4.1 years) of coal mine employment with Kennis Coal Company.

New Block Coal Company (1942 – 1944)

Social Security records reflect a total of two quarters of earnings for this employer during 1942 and 1943. Dx. 2. There was no testimony at the hearing regarding Claimant's work at New Block Coal. Claimant testified at the hearing that he worked for Black Hawk Engineering in from April to September in 1942 "right after (he) got out of the mines . . .." Tr. at 23-24. He went back to the mines in the Fall. Tr. at 24. As previously noted, Claimant also testified that he served in the Army from July 1944 to October 1945. Tr. at 18.

Claimant reported varying periods of employment with New Block on the forms CM-911a filed with each of his claims. In the first claim, he reported working for New Block from 1942 or 1943 to 1944. Dx. 1, 2, and 6. Although the Social Security records corroborate two quarters of employment for this employer in 1942 and 1943, there is no basis to credit Claimant

with additional employment at New Block particularly in light of: (1) the miner's employment with Black Hawk Engineering during this time; (2) his service in the Army during this time; and (3) Claimant's testimony that the mines did not operate in the summertime. At New Block, Claimant stated on the CM-911a that he shoveled coal and extracted coal. This constitutes qualifying coal mine employment under the Act. As a result, Claimant is credited with .5 years of coal mine employment with New Block.

Jacob Foster (1945 – 1949)

On the CM-911a submitted in conjunction with his first claim, the miner asserted that he worked for Jacob Foster doing coal mine work. Dx. 1. Social Security records reflect six quarters of earnings with this employer from 1946 to 1949.

At the hearing, Claimant testified that he transported "stoker coal" from 1945 to 1949. Tr. at 10. He described his job at the time as follows:

> [W]e hauled a lump of coal to a crusher and you had to stand there in all that dirt and dust and waited for them to get it priced and get your truck loaded so it was loaded right and then deliver it to houses, wherever it went in, down Centerville.

Tr. at 11. The record contains an affidavit from Jake Foster dated January 16, 2003, wherein he states the following:

> Thomas worked for me during slow periods in the mining work as he also worked underground digging and loading coal by hand. Thomas loaded this coal by hand and by tipple filling. In both incidence (sic), there was a lot of coal dust involved in both methods of loading the trucks. All lump coal was unloaded at manufacturing sites by hand and most of the stoker coal had to be unloaded by hand shoveling . . . again involving lots of coal dust. Thomas was a good worker. He drove (a) truck and stockpiled coal during March thru September 1946, 1947, and 1948 for coal burning power plants and brick yard.

Dx. 24.

Delivery of coal to consumers, or handling coal for consumers, does not qualify as coal mine employment under the Act and, therefore, this period of employment cannot be counted. Buckley v. Director, OWCP, 6 B.L.R. 1-1192 (1984). Consequently, none of the employment with Jacob Foster may be counted as coal mine employment under the Act.

Ragona Coal Company (1949 – 1951)

On the CM-911a, Claimant asserted that he worked for this company from 1945 to 1948. Dx. 6. At the hearing, he recalled that he worked for Ragona Coal from 1949 to 1951. Tr. at 13. There are no Social Security records reflected for this employer. At Director's Exhibit 8, there are two undated statements regarding Claimant's employment at Ragona, but these statements are of questionable reliability. First, is a statement by Andrew Bagona wherein it is written:

> I, Andrew Ragona, certify that I personally know that Thomas Jacobs . . . worked in the mines from 1948 to 1950.

It is further stated that the miner left because of "other employment." Second, on the same page is an undated statement by Paul Saldana stating:

> I, Paul Saldana, was a mining machine operator at the Ragona Coal Co., Centerville, IA when Thomas Jacobs loaded coal at the mine, shoveled some on the machine and loaded coal on the coal cars.

Later in the record, at Director's Exhibit 24, there is a statement dated January 16, 2003 from Andrew Ragona wherein he states:

> I know that Thomas V. Jacobs . . . worked in the underground coal mines of Appanoose County, Iowa at the RAGONA COAL COMPANY, in Centerville, Iowa after his discharged from the U.S. Army in October 1945 until the mine was closed down in 1952. Thomas worked as a shoveler behind the mining machine, loaded coal by hand and hauled coal from the mine to various sites during slow periods. He worked in dirty and dusty places and had to wear, at times, a mask because of these conditions.

Dx. 24. Based on the foregoing information, there is corroborating evidence that Claimant worked for Ragona Coal. The length of time he spent at this company is less definitive. Mr. Ragona's January 16, 2003 statement conflicts with other evidence of record as well as with Claimant's recollections. Based on Mr. Ragona's affidavit, it is evident that Claimant performed qualifying coal mine work for this company. Giving Claimant the benefit of the doubt and relying on his testimony that he worked for Ragona Coal from 1949 to 1951, it is again presumed that the mine did not operate in the Summer months such that Claimant actually worked nine months during each calendar year. As a result, Claimant is credited with 2.25 years of employment with this company.

Conclusion

Based on the foregoing, Claimant is credited with the following coal mine employment at each named company:

Kennis Coal Company	4.1 years
New Block Coal Company	0.5 years
Jacob Foster	0 years
Ragona Coal Company	2.25 years
The New Midway Coal Company	0.25 years[1]

[1] The New Midway Coal Company is listed in Claimant's Social Security records for one quarter in 1942. *Dx.* 2. Although there was no testimony regarding this Company at the hearing, the miner will be accorded the benefit of the doubt and given credit for this quarter of earnings.

TOTAL	7.1 years of qualifying coal mine employment

The Standard for Entitlement

Because this claim was filed after April 1, 1980, it is governed by the regulations at 20 C.F.R. Part 718 (2005).[2] Under Part 718, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis; (2) arising out of coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986)(en banc); Baumgartner v. Director, OWCP, 9 B.L.R. 1-65 (1986)(en banc). Failure to establish any one these elements precludes entitlement to benefits.

Testimony at the Hearing

Claimant testified that he would not be able to work in the mines today because his "lungs wouldn't take it." Tr. at 15. He currently uses Albuterol to help his breathing. Tr. at 15. He stated that his treating physician, Dr. Cathy Lang, has recommended that he be on oxygen. Tr. at 16-17. Claimant has not started using oxygen because "[i]t's something you hate to go onto." Tr. at 17.

Claimant testified that he started smoking cigarettes when he left the Army in 1945 and smoked "off and on probably until '73, along in there" for a total of 25 to 30 years. Tr. at 21. He smoked one to one and one-half a pack of cigarettes per day during that time. Tr. at 21.

Existence of Pneumoconiosis and its Etiology

Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

> (a) For the purpose of the Act, "pneumoconiosis" means a "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> > (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of

[2] As the miner last engaged in coal mine employment in the State of Iowa, appellate jurisdiction of this matter lies with the Eighth Circuit Court of Appeals. *Shupe v. /director, OWCP*, 12 B.L.R. 1-200. 1-202 (1989)(en banc).

particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. The definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (2005). Moreover, the regulations at 20 C.F.R. § 718.203(b) (2005) provide that, if a miner suffers from pneumoconiosis and has engaged in coal mine employment for less than ten years, as in this case, Claimant must submit reasoned and documented medical evidence to demonstrate that his pneumoconiosis arose out of such coal dust employment.

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a) (2005)[3].

Because clinical pneumoconiosis has been conceded by the Director, the chest x-ray evidence will not be summarized. However, the medical opinions of record will be reviewed and summarized in order to determine (1) whether the miner suffers from legal pneumoconiosis, and (2) whether his clinical and/or legal pneumoconiosis stems, in part, from exposure to coal dust.

Claimant may establish that he suffers from legal pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. See Hoffman v. B&G Construction Co., 8 B.L.R. 1-65 (1985); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984).

[3] There is no autopsy or biopsy evidence in this record and the presumptions contained at §§ 718.304 - 718.306 are inapplicable such that these methods of demonstrating pneumoconiosis will not be discussed further

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. Fields, supra. Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989)(en banc). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports which support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. Wilburn v. Director, OWCP, 11 B.L.R. 1-135 (1988). The following medical reports were admitted as evidence in the record:

Dr. Steven Zorn

Dr. Steven Zorn examined and tested the miner and issued a report on October 15, 1979. Dx. 2. He noted ten years of coal mine employment as well as a history of smoking two packs of cigarettes per day for 30 years, where the miner quit three years ago. Examination of the lungs produced normal findings as did the cardiac examination. The miner reported a daily productive cough that was ongoing for 12 years as well as dyspnea. Dr. Zorn stated the following:

> There is a chronic morning productive cough. He denies any history of asthma. There is no history of myocardial infarction, proxysmal nocturnal dyspnea, angina, peripheral edema. He is on no medications with exception of aspirin for some peripheral arthritis. He is presently able to climb 2 flights of stairs and walk approximately 1 mile without getting short of breath. He can lift 60 pounds and carry this approximately 30 yards.

Dr. Zorn diagnosed the presence of chronic bronchitis. With regard to the etiology of this condition, he stated the following:

It is hard to determine whether the chronic bronchitis is related to his coal mine exposure or to his chronic smoking history however at present he has no limitation in his exercise tolerance from either a cardiac or respiratory point of view and his screening spirometry is entirely normal.

Dx. 2.

Dr. Alda Knight

Dr. Alda Knight examined and tested the miner and issued a report on September 6, 1984. Dx. 2. Dr. Knight noted 12 years of coal mine employment as well as a history of smoking three packs of cigarettes per day for 25 years until the miner quit ten years ago. The miner complained of a dry cough of three years' duration as well as dyspnea and chest pain on exertion and orthopnea. Examination of the lungs produced normal findings. Cardiac examination was also normal. Ventilatory and blood gas testing yielded non-qualifying results. A chest x-ray demonstrated borderline cardiomegaly and "a few scattered apparently calcified nodularities and some increased pulmonary markings." Dr. Knight concluded that the miner had no evidence of pulmonary disease, the stress test was "equivocal" for cardiac disease, and he

suffered from ulcers by history. There was no diagnosis of any coal dust related pulmonary or respiratory impairment.

Dr. Stephen S. Jewett

Dr. Stephen S. Jewett examined and tested the miner and issued a report on December 13, 2002. Dx. 17. Dr. Jewett reported approximately 12 years of coal mine employment as well as a history of smoking less than one pack of cigarettes per day from the ages of 22 years to 27 years.

The miner complained of daily productive cough as well as dyspnea, chest pain with cough, and orthopnea. Examination of the lungs revealed distant breath sounds and bilateral rhonchi. An EKG yielded evidence of atrial fibrillation. Ventilatory testing produced non-qualifying results. Blood gas testing also produced non-qualifying results. A chest x-ray indicated "mild cardiomegaly" according to Dr. Jewett.

As a result, Dr. Jewett diagnosed atrial fibrillation based on the EKG and chronic bronchitis as indicated "by (the miner's) cough for more than 3 months out of the year." He stated that the cause of the atrial fibrillation was arteriosclerotic heart disease and the "chronic bronchitis was probably an infective process." Dr. Jewett concluded the following with regard to the extent of Claimant's disability:

> Patient has moderate respiratory impairment from his chronic bronchitis indicative by his inability to walk 2 blocks before getting short of breath and he can climb ½ - 1 flight of stairs without getting short of breath. Chronic bronchitis is probably a major cause of this dyspnea although the atrial fibrillation may also be a contributing factor.

Dr. Robert A. Cohen

Dr. Robert A. Cohen examined and tested the miner and issued a report on May 20, 2003. Dx. 31. He noted 15 years of coal mine employment from 1936 to 1951. Dr. Cohen also noted a history of smoking three to four cigarettes per day where the miner quit in 1946. Dr. Cohen did not provide a starting date for the miner's smoking history.

The miner complained of "cough productive of black secretions, mostly in the morning and shortness of breath, which prevents him from walking more than one block." Dr. Cohen also noted complaints of orthopnea and paroxysmal nocturnal dyspnea. A history of atrial fibrillation was recorded, but the cardiac examination revealed "[r]egular rate and rhythm, no murmurs, normal S1, S2." A chest x-ray produced evidence of Category 1 pneumoconiosis. Ventilatory testing yielded non-qualifying values. Similarly, blood gas testing produced non-qualifying values. Although Dr. Cohen found the presence of a "moderate diffusion impairment with a low normal D1/VA", he noted that some of this impairment "may be due in part to poor inspiratory volumes."

Claimant underwent a "Cardiopulmonary Exercise Examination" and Dr. Cohen concluded the following:

Sub-maximal exercise study by metabolic criteria, however, maximal cardiac stress indicated by very high heart rate and double product at peak exercise of 31,104. Work capacity was moderately impaired. There was no evidence of a significant pulmonary limitation at this level of exercise.

Dr. Cohen diagnosed the presence of coal workers' pneumoconiosis based on a positive chest x-ray as well as "[e]arly to mild obstructive lung disease due to (the miner's) 15 years of coal mine dust exposure." Dr. Cohen noted only "negligible exposure to tobacco smoke." Finally, he diagnosed hypertension and atrial fibrillation.

With regard to the extent of the miner's impairment, Dr. Cohen found: (1) "moderate diffusion impairment but no impairment at all of FEV1"; (2) sub-maximal cardiopulmonary exercise testing with "no abnormalities of gas exchange"; and (3) the "pulmonary function and exercise studies (did) not show significant impairment and indicate(d) that the patient (was) not disabled for his last coal mine employment."

In an undated letter responding to Claimant's request for clarification dated June 9, 2005, Dr. Cohen stated:

> Your chest x-ray was positive for pneumoconiosis at the lowest category of disease. This is evidence that you have pneumoconiosis, but unfortunately, the Federal Black Lung requires that you also be disabled for your last coal mining job. This disability has to be from your lung disease.
>
> The breathing tests . . . showed only minimal impairment in your lung function, but not nearly enough to make you disabled for coal mining work. Your exercise test didn't show any problem with your lungs limiting your exercise. If anything, your exercise was limited by your blood pressure.
>
> I cannot explain your shortness of breath based on lung disease, it may be early cardiac disease, deconditioning, or your blood pressure.

Cx. A.

Dr. Cohen is the Medical Director of Pulmonary Physiology and Rehabilitation of the Division of Pulmonary Medicine and Occupational Medicine at Cook County Hospital in Chicago, Illinois. Cx. A.

Discussion of the medical evidence

There is no probative medical evidence that Claimant suffers from legal or clinical coal workers' pneumoconiosis. Although clinical pneumoconiosis has been conceded on this record, medical opinion evidence does not establish that it is due to the miner's history of exposure to

coal dust. Moreover, across medical examinations, Claimant has been diagnosed with chronic bronchitis. Dr. Zorn stated that it was "hard to determine" the cause of the bronchitis and he suggested that it could be due either to coal dust exposure or the miner's history of tobacco abuse. His opinion loses probative value because of his equivocal conclusions. Justice v. Island Creek Coal Co., 11 B.L.R. 1-91 (1988) (an equivocal opinion regarding etiology may be accorded less weight). Dr. Knight did not diagnose any coal dust related pulmonary or respiratory impairment. Dr. Jewett diagnosed chronic bronchitis that was "probably an infective process." Thus, he report did not contain any findings of a coal dust related disease.

Finally, Dr. Cohen diagnosed clinical pneumoconiosis by x-ray as well as an "early to mild obstructive lung disease" caused by 15 years of coal dust exposure. Dr. Cohen noted a "negligible exposure to tobacco smoke" of three to four cigarettes per day where the miner quit in 1946. This opinion is not probative because Dr. Cohen relies on a coal dust exposure history that is more than double the history established on this record. Worhach v. Director, OWCP, 17 B.L.R. 1-105 (1993) (per curium) (it was proper to accord less weight to a physician's opinion based on eight years of coal mine employment where the miner demonstrated only four years of such employment). Moreover, Dr. Cohen's opinion is not credible because he relied on a "negligible" history of smoking three to four cigarettes per day. Claimant clearly had a significant smoking history which, according to his testimony, consisted of smoking one and one-half a pack of cigarettes per day for 25 to 30 years. Trumbo v. Reading Anthracite Coal Co., 17 B.L.R. 1-85 (1993) (a physician's opinion is less probative if it is based on an inaccurate smoking history). As a result, Dr. Cohen's opinion that the miner's clinical or legal pneumoconiosis arose from exposure to coal dust is undocumented.

On balance, Claimant has not presented evidence sufficient to demonstrate that he suffers from a coal dust related respiratory or pulmonary impairment.

Total Disability Due To Pneumoconiosis

Even if Claimant established the presence of coal workers' pneumoconiosis, his claim would be denied for failure to establish a totally disabling respiratory or pulmonary impairment related to the disease.

Benefits are provided under the Act for, or on behalf of, miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a) (2005). The regulations further state the following:

For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

20 C.F.R. § 718.204(a) (2005).

Moreover, pneumoconiosis must be a "substantially contributing cause" to the miner's total disability. 20 C.F.R. § 718.204(c)(1) (2005). The regulations define "substantially contributing cause" as follows:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1) (2005).

Twenty C.F.R. § 718.204(b) (2005) provides the following five methods to establish total disability: (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure;[4] (4) reasoned medical opinions; and (5) lay testimony.[5]

Total disability may be established through a preponderance of qualifying pulmonary function studies. The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 (2005) and require, in relevant part, that (1) each study be accompanied by three tracings, Estes v. Director, OWCP, 7 B.L.R. 1-414 (1984), (2) the reported FEV1 and FVC or MVV values constitute the best efforts of three trials, and, (3) for testing conducted after January 19, 2001, a flow-volume loop must be provided. The administrative law judge may accord lesser weight to those studies where the miner exhibited "poor" cooperation or comprehension. Houchin v. Old Ben Coal Co., 6 B.L.R. 1-1141 (1984); Runco v. Director, OWCP, 6 B.L.R. 1-945 (1984). To be qualifying, the regulations provide that the FEV1 be qualifying and either (1) the MVV or FVC values must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height, or (2) the result of the FEV1 divided by the FVC is equal to or less that 55 percent. The following pulmonary function studies are in the record:

Exhibit/ Date of Test	*Physician/* ***age/height (in.) coop/comp***	*Tracings/* ***Flow-Vol. Loop***	***Bronchodilator?***	***FEV1***	***FVC/MVV***	***Qualifies?***
Dx. 1 10-10-79	Zorn 57/69"	Yes No	No	3.56	4.33/166	No
Dx. 2 09-06-84	Knight 62/70"	Yes No	No	3.25	4.07/134	No

[4] There is no evidence of cor pulmonale with right-sided congestive heart failure such that this method of establishing total disability will not be discussed further.

[5] The Board holds that a judge cannot rely solely upon lay evidence to find total disability in a living miner's claim. *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

Dx. 2 03-14-86	Jewett 64/69¼" 	Yes No 	No Yes 	1.95 2.68 	4.26/49.26 3.97/41.3 	No No
Dx. 19 11-19-02	Jewett 80/67" good/good	Yes Yes 	No	2.73	3.55/92	No
Dx. 31 03-18-03	Cohen 81/69" good/good	Yes Yes 	No	2.68	3.96/87 (1 MVV trial)	No
Cx. B2, B3 07-18-05	Jewett 83/67" good/good	Yes Yes 	No	1.60	2.34/32	No

Based upon the foregoing, the miner has not established total disability pursuant to § 718.204(b)(2)(i) (2005) of the regulations. None of the ventilatory studies yielded qualifying values.

Total disability may also be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii) (2005). In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found at the table at Appendix C. The following blood gas studies are in the record:

Exhibit/ Date of Test	***Physician***	***Altitude (feet)***	***Resting (R) Exercise (E)***	***PCO2***	***PO2***	***Qualifies?***
Dx. 1 10-10-79	Zorn	0-2,999	R E	32 33	83 90	No No
Dx. 2 09-06-84	Knight	0-2,999	R E	36.4 38.7	87.4 101.5	No No
Dx. 18 11-19-02	Jewett	0-2,999	R E	33.8 31.9	79 94	No No
Dx. 31 03-18-03	Cohen	0-2,999	R E	31.1 29.8	75.5 99.9	No No
Cx. B1 07-18-05	Jewett	0-2,999	R	30.3	72.0	No

Based upon the foregoing, the miner has not demonstrated total disability pursuant to § 718.204(b)(2)(ii) (2005) of the regulations. None of the blood gas studies yielded qualifying values using heights recorded at the time of each examination.

The final method by which Claimant may establish total disability is through medical opinion evidence wherein a physician has exercised reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques to conclude that the miner's

respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable employment. 20 C.F.R. § 718.204(b)(2)(iv) (2005).

In this case, no physician of record concludes that Claimant suffers from a totally disabling respiratory or pulmonary impairment due, even in part, to coal dust exposure. Dr. Zorn found "no limitation in (the miner's) exercise tolerance from either a cardiac or respiratory point of view and his screening spirometry (was) entirely normal." Dr. Knight found no evidence of pulmonary disease and did not diagnose Claimant with a totally disabling respiratory or pulmonary impairment. Dr. Jewett found that the miner suffered from a "moderate respiratory impairment" stemming from his infection-induced chronic bronchitis. The physician who conducted the most recent examination of record, Dr. Cohen, concluded that breathing tests revealed "only minimal impairment" in lung function, which was "not nearly enough to make (Claimant) disabled for coal mining work." Dr. Cohen opined that any limitation in the miner's ability to exercise could be attributed to blood pressure. He stated, "I cannot explain your shortness of breath based on lung disease, it may be early cardiac disease, deconditioning, or your blood pressure."

As a result, Claimant has presented no evidence to demonstrate the presence of a totally disabling respiratory or pulmonary impairment arising from coal dust exposure.

ORDER

IT IS ORDERED that the claim for benefits filed by Thomas V. Jacobs is denied.

A

Thomas M. Burke
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is:

Benefits Review Board
U.S. Department of Labor
P.O. Box 37601
Washington, DC 20013-7601

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).